89-920

Supreme Court, U.S.
FILED
DEC 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO:

in the Supreme Court of the United States

OCTOBER TERM, 1989

JOEL ESTREMERA,

Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RENE A. SOTORRIO, ESQ.
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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

I.

WHETHER UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW AND DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW, BECAUSE PETITIONER'S JUDGMENT AND SENTENCE FOR FIRST DEGREE MURDER COULD NOT HAVE BEEN BASED ON FELONY MURDER AND PREMEDITATION WAS NOT PROVED.

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the petitioner and Richard L. Dugger.

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OPINION

The opinion of the United States Court of Appeals, Eleventh Circuit, denying Petitioner relief is reproduced in the Appendix. (A-1)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17 (a) and (c) of the Rules of the Supreme Court, Title 28 United States Code §1254 (1), and Title 28 United States Code §2253. The Eleventh Circuit Court of Appeals entered its order affirming the lower Court decision on July 31, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of Law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

See Appendix (A-2-3)

Florida Constitution Article 1 Section 9:

No person shall be deprived of life, liberty or property without due process of law, or be twice put in

jeopardy for the same offense, or be compelled in any Criminal matter to be a witness against himself.

STATUTE INVOLVED

Florida Statute Section 782.04:

See Appendix (A-3-5)

STATEMENT OF THE CASE

Petitioner, along with Co-defendants was charged by indictment in the trial court and stood trial on the following charges:

Count I: Aggravated Assault upon Lazaro Arriete.

Count III: Aggravated Assault upon Guy Sanchez.

Count IV: Kidnapping of Lazaro Arriete.

Count V: Attempted first degree murder upon Lazaro Arriette.

Count VI: Shooting into an occupied vehicle.

Count VII: First degree murder of Javier Perez.

Count VIII: Attempted first degree murder of Angel Hernandez.

Count IX: Attempted first degree murder of Frank Hernandez.

The jury returned the following verdicts as to Petitioner:

Count I:	Guilty as charged of Aggravated Assault.
Count III:	Guilty of the lesser charge of Improper Exhibition of a Weapon.
Count IV:	Guilty of the lesser charge of False Imprisonment.
Count V:	Not guilty.
Count VI:	Not guilty.
Count VII:	Guilty as charged of First Degree Murder.
Count VIII:	Guilty of the lesser offense of Aggravated Assault.
Count IX:	Guilty of the lesser offense of Aggravated Assault.

The trial court adjudicated Petitioner guilty on count VII of first degree murder, and sentenced him to life imprisonment with a minimum mandatory of twenty five (25) years. Petitioner thereafter filed a Motion for New Trial, which raised the failure of the trial court to instruct on third degree murder and attacked the sufficiency of the evidence as to premeditation. (A-6-11) This motion was denied.

The trial court then sentenced Petitioner to five years incarceration on counts I, VIII, and IX, fifteen years incarceration on count IV, and three hundred and sixty four days incarceration on count II, and reinstated a life sentence for first degree murder (A-12-17). A sentencing guidelines scoresheet was completed with the trial court noting in handwriting on that form,

during the sentencing hearing, its reasons for departure. (A-18,19).

Petitioner appealed the conviction and sentence to the Third District Court of Appeal. The Third District Court of Appeal affirmed the conviction and sentence. The Third District Court of Appeal's opinion is reported as *Joel Estremera vs. State* 498 So. 2d 575 (Fla. 3d DCA 1986).

On August 5, 1987 Petitioner filed a motion to vacate his conviction and sentence based upon the incompetence of Counsel, before the Third District Court of Appeals. (A-20-33) On August 28, 1987 said motion was denied and the Third District Court of Appeals opinion on said appeal is reported as *Joel Estremera vs. State*, 512 So. 2d 1123 (Fla. 3d DCA 1987). A petition for a writ of Habeas Corpus was filed by Petitioner on February 15, 1988 before the United States District Court for the Southern District of Florida. (A-34-39) On July 21, 1988, the Magistrate filed his report and recommendation recommending Petitioner's petition be denied. Petitioner filed written objections to the Magistrate's report on August 5, 1988.

On August 29, 1988 the United States District Court issued a Final Judgment denying Petitioner relief. (A-40). Appellant filed a timely notice of Appeal and request for issuance of a Certificate of Probable Cause with a Motion for leave to Appeal in Forma Pauperis and supporting affidavit on September 8, 1988. Leave to Appeal in Forma Pauperis was granted on September 21, 1988. Additionally, the United States District Court certified that probable cause existed for an appeal.

Subsequently on November 23, 1988 Petitioner appealed the Southern District of Florida's denial of his relief, to the United States Court of Appeal for the Eleventh Circuit, pursuant to Title 28 United States Code Section 2253. On July 31, 1989 the Eleventh Circuit affirmed the lower court's decision stating the evidence at trial was sufficient to support the jury finding of premeditation. (A-41). This petition ensued.

Petitioner, along with his codefendants, were members of a Carol City youth gang called "M.C.C." A rival youth gang called "Black Power" frequented a park in Hialeah named Babcock Park. A third gang called the "New York Ricans" was also mentioned.

The night before the crimes charged in this case allegedly occurred, Petitioner approached a group of youths in the parking lot of a theater, identified himself as "Joey from Carol City" and then "from the New York Ricans", telling the group that he was looking for someone named "Itchy". One individual, who knew members of Black Power, said he knew "Itchy", and a fight ensued. The fight ended when Petitioner was picked up by his neck and then put back down. The trial prosecutor argued that revenge for this incident was the motive for what happened the following day.

The next day, Petitioner and his codefendants met at an elementary school near Babcock Park. Petitioner and his codefendants, three of whom were armed with guns by that time spoke for about five minutes, and then entered Babcock Park.

Inside a recreation room at Babcock Park, at that time, was Lazaro Arriete, the victim named in Counts I, IV, and V. The testimony was conflicting on whether Arriete was a member of Black Power, as stated by one

prosecution witness, or that he "hung around" with members of that gang, as he claimed. In any event, Petitioner and one codefendant entered the recreation room, approached Arriette, and asked him if he was in the gang from Hialeah. Arriette responded by saying no. Petitioner told him to go outside. Arriette refused to go, after which Petitioner allegedly pointed a pistol at his stomach and took him outside. Before exiting the recreation room, a park employee named Guy Sanchez approached the three. Sanchez heard Petitioner say to Arriete, "come with me because you know who they are." Sanchez approached, Petitioner pivoted, pointing the gun at him, and Sanchez ran to the office.

Petitioner and codefendants allegedly removed Arriete from the recreation room at gunpoint and walked him through the parking lot. At that time, Javier Perez, the victim named in the murder count, approached on a bicycle. Javier Perez was the brother of Ivan Perez, a member of Black Power. Petitioner then approached Javier Perez, and Arriete said, "He's not the one. That's his brother."

Shane Fulton an employee of the City of Hialeah testified and his testimony indicates the confusion and speed during which the shooting occurred. Mr. Fulton testified Petitioner was holding Lazaro at gun point and at some point, Lazaro started to run behind a maintenance building. Mr. Fulton further testified that prior to Petitioner approaching the individual on the bicycle, a number of shots had already been fired. It was in the midst of these other shots and what Mr. Sanchez, another eye witness described as a very busy area that the fourth shot was fired at the victim. Arriete testified that he broke free as Petitioner was shooting at Perez and that he was shot at while running away.

Angel Hernandez, a State witness testified as follows:

Q. Could you remember approximately what time it was when you heard these sounds?

A. Well, it was close to 4:00 p.m.

Q. And you were at the refreshment place when you were where you just talked about?

A. I was inside of the place where the refreshments are sold.

Q. Ok. And when you heard those sounds, what did you do?

A. Well, I thought there were kids playing with fire crackers and then I went out to tell them no because they could bother the baseball games.

Q. When you went out, what did you see?

A. Then when I turned . . . when I went around the building, I see a kid coming in a bicycle and then some kids behind him that went around him in the bicycle.

Q. Ok. What did you see next?

A. And then, well, some of them with the weapons, when they fired and when the kid fell from the bicycle to the ground.

Q. Ok. Just go back now, what kind of weapons did you see?

A. Revolvers, weapons.

Q. And who did you see them with? Who had the weapons?

A. It was a group of four kids and I can't be precise that one of them didn't have a weapon.

Arriette and a individual called "Itchy" ran in front of a car being driven by Jose Hernandez and occupied by himself and George Diaz. At some point subsequent thereto, Petitioner and codefendants got into the car and were driven away. One of the defendants made a comment that they had "got a boy" and members of Black Power had been pointed out to them.

An individual named Frank Hernandez was coaching baseball at Babcock Park that day. He heard some shots fired from behind him. He turned around to see Javier Perez shot. Frank Hernandez and his father Angel Hernandez gave chase as Petitioner and codefendants fled. One shot fired in the direction of the parking lot hit a car occupied by Rolando Hernandez.

The medical examiner testified that Javier Perez sustained a single gunshot wound, which caused his death. A firearms expert found that projectiles recovered from the scene had been fired by three different projectiles.

Upon the Appellee resting, Petitioner moved for the entry of a judgment of acquittal, arguing, *inter alia*, that the Appellee had failed to show any premeditation. This motion was denied. All defendants rested without presenting evidence.

During the charge conference, the defense specifically requested an instruction on third degree murder as a lesser included offense on Count VII. The trial court denied this request.

REASON FOR GRANTING CERTIORARI

UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW AND DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW, BECAUSE PETITIONER'S JUDGMENT AND SENTENCE FOR FIRST DEGREE MURDER COULD NOT HAVE BEEN BASED ON FELONY MURDER AND PREMEDITATION WAS NOT PROVED.

Petitioner was charged and found guilty of first degree murder, under the alternative theory of premediation and/or felony murder, kidnapping specifically named as the underlying felony. Petitioner was also charged with kidnapping in Count IV of the indictment.

Although Petitioner was found guilty of first degree murder he was only found guilty of false imprisonment, a lesser included offense of kidnapping. Pursuant to Florida Statute Section 782.04 first degree felony murder cannot be supported by a conviction of false imprisonment as the underlying felony. Thus, a first degree judgment and sentence could have *only* been supported by a finding of premeditation.

The Circuit Court's opinion affirming the denial of Petitioner's Petition for Habeas Corpus considered sufficiency of the evidence as the sole issue of Petitioner's petition for relief.

The jury verdict finding Petitioner guilty of first degree murder, and false imprisonment were legally

inconsistent and denied Petitioner due process and equal protection of the law, unless sustainable by a finding of premeditation. *Streeter vs. State* 416 So. 2d 1203 (Fla. 3d. DCA 1982).

It is clear that the evidence did not establish premeditation beyond a reasonable doubt. The jury's conviction of false imprisonment in lieu of kidnapping indicated the jury did not find Petitioner had the intent to kill the victim or any other person.

Although premeditation may be proved by circumstantial evidence, if it fails to exclude the hypothesis that the accused intended to kill without premeditation, it is insufficient.

The decision of the Court of Appeals in finding Petitioner's Judgment and Sentence for First Degree Murder was sustained by the evidence is a substantial error which denies Petitioner Due Process and Equal Protection of the law and which this court should correct in the exercise of its supervisory powers.

CONCLUSION

The Court is urged to grant certiorari in order to settle the important issue of federal law.

Respectfully submitted,

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Appendix

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT
JULY TERM, A.D. 1987

CASE NO. 87-2172

JOEL ESTREMERA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed September 22, 1987.

An Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County, Arthur I. Snyder, Judge.

Joel Estremera, in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before BARKDULL, NESBITT and BASKIN, JJ.

PER CURIAM.

Affirmed. *Estremera v. State*, 498 So.2d 572 (Fla. 3d DCA 1986); Fla. R. Crim. P. 3.850; *see McCrae v. State*, 437 So.2d 1388 (Fla. 1983); *Yanks v. State*, 273 So.2d 401 (Fla. 3d DCA), *cert. denied*, 277 So.2d 288 (Fla. 1973).

UNITED STATES CONSTITUTION
AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a

member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any insurrection or rebellion against the United States, or any claim for the loss or emanicipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FLORIDA STATUTE SECTION 782.05

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of

the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisnment for a term of years not exceeding life or as provided in §775.082, §775.083, or §775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other that the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in §775.082, §775.083, or §775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing,

placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

all others in like cases offending and against the peace and dignity of the State of Florida Statutes.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

CASE NO. 84-14657-C

JUDGE SNYDER
BAR #291471

STATE OF FLORIDA

Plaintiff,

vs.

JOEL ESTREMERA,

Defendant

MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO SET ASIDE JUDGEMENT OF GUILT AND SENTENCE AS TO MURDER IN THE FIRST DEGREE

COMES NOW, the Defendant, JOEL ESTREMERA, by and through his undersigned attorney and pursuant to Rule 3.600 as well as 3.620 of the F.R. Cr.P. and respectfully request that this Honorable Court enter an Order granting the Defendant a new trial or in the alternative vacating his judgement of guilt and subsequent sentence as to Count IX of the Indictment filed against him, First Degree Murder. As grounds therefore, the Defendant would show unto the Court the following;

1. That the Defendant, JOEL ESTREMERA along with Co-defendants, RICARDO REDONDO, JOSE LUSIS OGAZA, and GUSTAVO ADOLFO

BENEDIT were indicted by the Grand Jury sitting in and for the Eleventh Judicial Circuit of Florida and was charged in Count IV of that Indictment with *KIDNAPPING*.

COUNT IV

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 23rd day of June, 1984, within the County of Dade, State of Florida, RICARDO ENRIQUE REDONDO. also known as "ARGENTINO", without unlawful authority did then and there forcibly, secretly, or by threat, confine, abduct or imprison another person, to wit: LAZARO ARRIETE against that person's will with intent to commit or facilitate the commission of any felony, to wit: Aggravated Assault and/or Attempted Murder and/or Murder and/or to inflict bodily harm upon or to terrorize the victim or any other person and during the commission of this act or acts, the defendant carried, displayed, used, threatened, or attempted to use a weapon or firearm, to wit: A pistol, in violation of 787.01 and 775.087 and 777.011 Florida Statutes to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

2. That additionally, the Defendant's in the same indictment in Count IX was charged with First Degree Murder and that Count reads as follows.

COUNT IX

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 23rd day of June, 1984, within the County of Dade, State of Florida, RICARDO ENRIQUE REDONDO, also known as "ARGENTINO", JOSE LUIS OGAZA, JOEL ESTREMERA and GUSTAVO ADOLFO BENEDIT, did unlawfully, feloniously, from a premeditated design to effect the death of a human being, or while engaged in the perpetration of, or in an attempt to prepetrate Kidnapping kill JAVIER PEREZ, a human being by shooting him with a firearm, to wit: A pistol, in violation of Florida Statute 782.04 and 777.011 to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida Statutes.

3. That a jury trial was held before this Honorable Court commencing on April 15th, 1985.

4. On April 24th, 1985, the jury rendered a verdict against the Defendant, JOEL ESTREMERA, as to Count IV as contained in the Indictment, finding him guilty of the lesser included offense of *FALSE IMPRISONMENT*.

5. That as to Count IX of the Indictment, the jury found the Defendant guilty of First Degree Murder and in accordance with the Statutes, this Honorable Court immediately thereafter sentenced the Defendant to serve a term of life in prison without possibility of parol for twenty-five years.

6. That the aforementioned verdict of guilt as to Premeditated Murder in the First Degree cannot be substantiated and is contrary to the weight of the evidence. *Clay v State,* 424 So2d 139 (3rd DCA 1983), *Wang v State,* 426 So.2d 1004 (3rd DCA 1983).

7. That pursuant to Florida caselaw, the facts brought forward at trial failed to substantiate premeditation and the requisite malice of forethought by the Defendant to affect the death of JAVIER PEREZ. *Clay v State, supra, Wang v State, supra.*

8. That the verdict of First Degree Murder cannot be substantiated under the felony murder theory prusuant to Florida Statute 782.04(4) which indicated "that the unlawfil killing of a human being when perpetrated without any design to effect death by a person engaged in the perpetration of or in the attempt to perpetrate any felony *other* than any trafficking offense, arson, sexual battery, robbery, burglary, KIDNAPPING, escape, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb shall be Murder in the Third Degree and shall constitute a felony of the Second Degree as punishable by Sections 775,082, 775.083, or 775.084."

9. That as expressed in paragraph 8, False Imprisonment is *not* an enumerated felony sufficient to sustain a conviction for First Degree Felony Murder.

10. That pursuant to Florida Statute 782.04(4), in the case *sub judice,* the appropriate verdict under the facts and circumstances should have been that of Murder in the Third Degree and the Defendant should be sentenced by this Honorable Court in accordance with the Sections provided herein.

11. That in light of the fact that the prosecution alleged Felony Murder, this Honorable Court erred by failing to instruct the jury as to the lesser included offense of Murder in the Third Degree as requested by the defense and as specified in Section 782.04(4). The error was fundamental.

12. That this Honorable Court fundamentally erred in failing to instruct the jury on the law of circumstantial evidence as requested in the case *sub judice* in light of the fact that the prosecutor relied substantially on circumstantial evidence. *Perez v State*, 371 So.2d 714 (2nd DCA 1979).

13. Other grounds to be argued and further caselaw to be submitted at the time of hearing.

WHEREFORE, by reason of the foregoing, the Defendant respectfully requests that this Honorable Court enter an Order granting the Defendant a new trial or in the alternative to set aside the Defendant, JOEL ESTREMERA'S conviction for Murder in the First Degree, substituting in its place a conviction of Murder in the Third Degree. Additionally, the Defendant, JOEL ESTREMERA, request that this Court withdraw its previously imposed life sentence without the possibility of parole for twenty-five years and in accordance with this Motion and the law, sentence the Defendant as provided in 775.082, 775.083 or 775-084.

I HEREBY CERTIFY that a copy of the foregoing was delivered to Flora Seff, Assistant State Attorney, Metro-Justice Building 1351 NW 12 Street, Miami, Florida and a copy mailed to Miguel San Pedro, Esq., 4200 SW 3rd Street, Miami, Florida, Federico Moreno, 714 Biscayne Building, 10 West Flagler Street, Miami,

Florida and to Howard Sohn, 8625 Biscayne Blve., Miami, Florida, this 2nd day of May, 1985.

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/s/ C. Stella

C. CRAIG STELLA, ESQ.

[FILED MAY 20, 1985]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Defendant JOEL ESTREMERA

Case Number 84-14657-C

SENTENCE

(As to Count 4)

The Defendant, being personally before this Court, accompanied by his attorney, C. STELLA, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that;

The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned

For a term of FIFTEEN (15) YEARS

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum

It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm, to run concurrently with min.mand. imposed as to Count 7.

Jail Credit

It is further ordered that the Defendant shall be allowed a total of 422 days credit for such time as he has been incarcerated prior to imposition of this sentence.

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run concurrent with the sentence set forth in count SEVEN (7) above.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Defendant JOEL ESTREMERA

Case Number 84-14657-C

SENTENCE

(As to Count 1, 8 & 9)

The Defendant, being personally before this Court, accompanied by his attorney, C. STELLA, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that;

The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned

For a term of FIVE (5) YEARS as to each count and each count to run concurrently with each other.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm — 3 year mandatory minimum

It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the

sentence specified in this count, as the Defendant possessed a firearm, each count concurrent and concurrent with min.mand. imposed in Count 7.

Jail Credit

It is further ordered that the Defendant shall be allowed a total of 422 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration: as to each count and each count to run concurrently with each other.

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run concurrent with the sentence set forth in count SEVEN (7) above.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Defendant JOEL ESTREMERA

Case Number 84-14657-C

SENTENCE

(As to Count 3)

The Defendant, being personally before this Court, accompanied by his attorney, C. STELLA, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that;

The Defendant is hereby committed to the custody of the Sheriff of DADE County, Florida

To be imprisoned

For a term of THREE HUNDRED SIXTY FOUR (364) DAYS

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Jail Credit

It is further ordered that the Defendant shall be allowed a total of 422 days credit for such time as he

has been incarcerated prior to imposition of this sentence.

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run concurrent with the sentence set forth in count SEVEN (7) above.

In the event the above sentence is to the Department of Corrections, the Sheriff of DADE County, Florida is hereby ordered and directed to deliver the defendant to the Department of Corrections together with a copy of this judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Mami, Dade County, Florida, this 20th day of August A.D., 1985.

/s/ Arthur I. Snyder
JUDGE
ARTHUR I. SNYDER

[FILED AUG 20, 1985]

Rule 3.988(i)
Category 9: All Other Felony Offenses

1. DOCKET NO. (PRIMARY OFFENSE) 84-14657

3. COUNTY DADE CTY

4. JUDGE SNYDER

5. DATE OF SENTENCE 8-20-85

6. NAME JOEL ESTREMERA

7. DATE OF BIRTH 11/23/65

8. SEX M

9. DATE OF OFFENSE 6-23-84

10. PRIMARY OFFENSE AT CONVICTION 1st° MURDER

I. Primary offense at conviction

Degree 2nd

Number of Counts 1

Points 108

II. Additional offense at conviction

Degree 3rd

Number of Counts 3

Points 16

Degree MM

Number of Counts 1

Points 2

Total 126

Reasons for departure:

Tremendous risk of injury to entire public. This was defendant who [illegible]responsible for entire incident — Tremendous [illegible]problem to citizen. Age of Victim—1st degree murder does not take these problems in sentencing guidelines

Guideline Sentence:

Community Control and/ 12-30 months

/s/ Flora E. Seff
State Attorney

/s/ [illegible]
Defendant/Defense Counsel

/s/ Flora E. Seff
Scoresheet Preparer

[FILED JULY 30, 1987]

IN THE CIRCUIT COURT FOR THE
ELEVENTH JUDICIAL CIRCUIT
DADE COUNTY, FLORIDA

CASE NO. 84-14657-C

(1st)
RULE 3
Judge Arthur I. Snyder

STATE OF FLORIDA,

PLAINTIFF,

vs.,

JOEL ESTREMERA,

DEFENDANT.

MOTION FOR POST-CONVICTION RELIEF AND SUPPORTING MEMORANDUM OF LAW

COMES NOW the Defendant, JOEL ESTREMERA, *pro se* and moves this Court to vacate the JUDGEMENT and SENTENCE herein pursuant to Rules 3.850 and 3.987, *Fla.R.Cr.P.* (1987), based upon the following grounds and reasons:

1) The judgement and conviction under attack was entered in the Eleventh Judicial Circuit Court in and for Dade County, Florida.

2) The date of judgement of conviction was April 24, 1985.

3) Defendant was convicted of: Count I — Aggravated Assault; Count III — (Lesser Included)

Improper Exhibition of a Weapon; Count IV — (Lesser Included) False Imprisonment; Count VII — First Degree Murder; Count VIII — (Lesser Included) Aggravated Assault; and, Count IX — (Lesser Included) Aggravated Assault.

4) Length of Sentences imposed: Counts I, VIII and IX — five (5) years incarceration; Count IV — fifteen (15) years incarceration; Count II — three-hundred and sixty-four (364) days incarceration; (All to be served concurrent with Count VII); and, Count VII — Life imprisonment with twenty-five (25) minimum mandatory.

5) Defendant pled not guilty.

6) Jury trial was held on April 15-24, 1985.

7) Defendant did not testify at trial or pre-trial hearings.

8) A direct appeal was taken.

9) (a) Third District Court of Appeal

(b) Conviction affirmed per curiam.

(c) Appeal denied December 2, 1986.

(d) *Estremera vs. State,* 498 So.2d. 572 (3rd DCA 1986)

10) No other petitions, applications or motions have been filed in this Court with respect to this judgement and sentence.

11) N/A.

12) No other petitions, applications or motions have been filed in any other Court with respect to this judgement and sentence.

13) N/A.

14) GROUNDS FOR RELIEF

A. THE JUDGEMENT AND SENTENCE IS FUNDAMENTALLY DEFECTIVE WHERE THE STATE FAILED TO PROVE THE UNDERLYING FELONY IN A FELONY MURDER PROSECUTION AND WHERE LEGALLY INCONSISTENT JURY VERDICTS ESTABLISH THAT PREMEDITATION WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

SUPPORTING FACTS: Defendant was charged with first degree murder pursuant to §782.04 *Florida Statutes* (1977). The State also charged that Defendant committed the murder during the commission of or attempted commission of a kidnapping. (*i.e.*, Felony Murder theory). However, the jury returned a guilty verdict on a lesser included offense of False Imprisonment, which is not one of the enumerated felonies listed in §782.04(1) *Florida Statutes*. While the jury could have found Defendant guilty of premeditation in the alternative, the jury verdicts are legally inconsistent and cannot support such a finding. By finding Defendant guilty of the lesser offense of False Imprisonment, the jury clearly rejected the theory that Defendant intended to commit or facilitate commission of the *murder* or other felonies as charged in the indictment. The State had argued that Defendant had a "plan to kill" (murder) the victim but the jury found this plan insufficient to convict on the kidnapping charge. It would, therefore, be legally

insufficient to form the basis of a finding of premeditation outright.

STATEMENT OF THE CASE AND FACTS

The Defendant, along with his codefendants, were members of a Carol City youth gang called "M.C.C.". A rival youth gang called "Black Power" frequented a park in Hialeah named Badcock Park. A third gang called the "New York Ricans" was also mentioned.

The night before the crimes charged in this case allegedly occured, the Defendant approached a group of youths in the parking lot of a theater, identified himself as "Joey from Carol City" and then "from the New York Ricans," telling the group that he was looking for someone named "Itchy". One individual, who knew members of Black Power, said he knew "Itchy", and a fight ensued. The fight ended when the Defendant was picked up by his neck and then put back down. The prosecutor argued that revenge for this incident was the motive for what happened the following day.

The next day, the Defendant and his codefendants met at an elementary school near Badcock Park. The Defendant and his codefendants, three who were armed with guns by that time, spoke for about five minutes and then entered Badcock Park.

The victim named in Counts I, IV and V, Lazaro Arriete, was inside a recreation room at Badcock Park at the time. The testimony was conflicting on whether Arriete was a member of Black Power, as stated by one prosecution witness, or whether he "hung around" with members of that gang as he claimed. In any event, the Defendant and one codefendant entered the recreation

room, approached Arriete and asked him if he was in the gang from Hialeah. Arriete responded by saying no. The Defendant told him to go outside. Arriete refused to go, after which the Defendant pointed a pistol at his stomach and took him outside. Before exiting the recreation room, a park employee named Guy Sanchez approached the three. Sanchez heard the Defendant say to Arriete, "Come with me because you know who they are." As Sanchez approached, the Defendant pivoted, pointing the gun at him and Sanchez ran to the Office.

The Defendant and his codefendants removed Arriete from the recreation room at gunpoint and walked him through the parking lot. At the time, Javier Perez, the victim named in the murder count, approached on a bicycle. Javier Perez was the brother of Ivan Perez, a member of Black Power. The Defendant then approached Javier Perez and Arriete said, "He's not the one. That's his brother."

An individual named Frank Hernandez was coaching baseball at Badcock Park that day. He heard some shots fired from behind him and turned and saw that Javier Perez had been shot. Shane Fulton, a park employee, testified that Arriete began to run and that the two codefendants fired at Arriete while a fourth shot was fired at Perez. Arriete testified that he broke free as the Defendant was shooting at Perez and that he was shot at while he was running away. One shot fired in the direction of the parking lot hit a car occupied by Rolando Hernandez.

Frank Hernandez and his father, Angel Hernandez gave chase as the Defendant and codefendants fled. Shots were fired at both of them.

Arriete and an individual named "Itchy" ran in front of a car being driven by Jose Hernandez and another occupant, George Diaz. At some point subsequent thereto, the Defendant and codefendants got into the car and were driven away. One of the Defendants made a comment that they had "got a boy" and that members of Black Power had been pointed out to them.

The Medical Examiner testified that Javier Perez sustained a single gunshot wound which caused his death. A firearms expert found that the casings recovered from the scene had been fired by three different weapons.

ARGUMENT AND SUPPORTING AUTHORITY

As a matter of law, two theories of intent will support a first degree murder conviction: premeditation and felony murder. §782.04 *Fla. Stat.* (1977). The Courts have construed these two theories as "legal equivalents", or put another way, one provable "in lieu of" the other. *Sloan vs. State,* 70 Fla. 163, 69 So. 871 (Fla. 1915); *See also, Knight vs. State,* 338 So.2d. 201 (Fla. 1976). The two theories are related because each provides the *element of intent* necessary for conviction of murder in the first degree. *See, State vs. Jones,* 377 So.2d. 1163 (Fla. 1979).

Defendant was convicted of first degree murder by jury verdict finding Defendant "guilty as charged in the indictment", (R-277; App. "A"). The indictment charged that Defendant committed the murder from a premeditated design (premeditated murder) or while engaged in the perpetration of or in attempt to

perpetrate a kidnapping (felony murder). *See,* §782.04(1) *Fla. Stat.* (1977) (*See also,* R-16; App. "D") Defendant was also charged substantively with the underlying felony (kidnapping) in Count IV of the indictment, (R-14; App. "B") however, the jury returned a verdict of guilty of a lesser included offense: False Imprisonment With a Firearm (R-274); App. "E"). Since the jury failed to return a verdict of one of the enumerated felonies in §782.04(1) *Fla. Stat.,* the judgement and sentence is fundamentally defective because proof of the kidnapping was required to establish the requisite intent necessary and was indispensable to the felony murder conviction especially where legally inconsistent jury verdicts establish that premeditation was not proven beyond reasonable doubt.

In a second thrust, the State also specifically charged Defendant with kidnapping during the commission or attempted commission of certain specific offenses, . . . "to wit: aggravated assault and/or attempted murder[1] and/or *murder* and/or to inflict bodily harm upon or to terrorize the victim or any other person . . ." (R-14; App. "B"). Having done so, the State was required to prove that Defendant had the *intent* to commit one or more of the charge felonies. *See, Bennet vs. State,* 438 So.2d. 1034 (2nd DCA 1983).

As it is though, the jury found Defendant only guilty of false imprisonment, effectively holding him

[1]Defendant was found not guilty of the attempted first degree murder of Lazaro Arriete (Count V; App. "F") and guilty of the lesser included offense of aggravated assault on the charge of attempted first degree murder of Angel Hernandez (Count VIII; App. "G" & "H").

innocent of intent to commit or facilitate commission of the specific underlying offenses alleged: *i.e.*, offenses the State was required to prove to establish specific intent to commit the kidnapping. *See, Kirksey vs. State,* 433 So.2d. 1236 (1st DCA 1983) and *Rauso vs. State,* 425 So.2d 618, 620 (4th DCA 1983). Conviction of the lesser offense is tantamount to acquital of the higher offense and intent to commit the enumerated felonies. *See, Bradley vs. State,* 378 So.2d. 870 (2nd DCA 1979) and and *Sanford vs. State,* 75 Fla. 393, 78 So. 340 (Fla. 1918)

At the trial of this cause, the prosecutor argued in support of the theory of premeditation that Defendant and his accomplices went to Badcock Park with a "plan to kill" (murder) but there was no direct evidence showing such a plan or for that matter disproving Defendant's theory that there was a "plan to fight" instead. By finding defendant guilty only of false imprisonment, the jury clearly rejected the theory that Defendant intended to commit or facilitate commission of the *murder* or other charged felonies, effectively vitiating the guilty verdict on the very same felony charged as the primary offense. By finding Defendant guilty only of false imprisonment, the jury clearly rejected the theory that Defendant intended to commit or facilitate commission of the murder or other named felonies, *See e.g., Waters vs. State,* 436 So.2d. 66 (Fla. 1983). The State's "plan to kill" argument must fail then, because the jury verdicts are legally inconsistent and cannot therefore, provide an independent basis for a finding of premeditation outright. *See, Ayrando vs. State,* 431 So.2d 320 (34d DCA 1983); *Wooten vs. State,* 404 So.2d. 1072 (3rd DCA 1981); *Mills vs. State,* 407 So.2d. 218 (3rd DCA 1981); *MaHaun vs. State,* 377

So.2d. 1158 (Fla. 1979) and *Redondo vs. State*, 403 So.2d. 954 (Fla. 1981). To convict Defendant of premeditated murder as charged, the State was required to prove Defendant intended to commit the murder. The jury verdict finding Defendant not guilty of intent to commit the murder to facilitate the kidnapping vitiates the intent to commit murder in the *main*.

Since there is no independent proof of the element of premeditation, it logically flows that *requisite intent* in this case can only be established by proof of the felony murder theory, *See, Hampton vs. State*, 336 So.2d. 378 (1st DCA 1976) and *State vs. Hegstrom*, 401 So.2d. 1343 (Fla. 1981). This ancient principle is based on the implied fact and presumption in law that the accused's perpetration of a violent felony supplants the element of premeditation: *i.e.*, the offense remains premeditated murder; only an element of it is deemed proven by evidence of the accused's felonious conduct, *See, Leiby vs. State*, 50 So.2d. 529, 531-32 (Fla. 1951): *See also, Ables vs. State*, 338 So.2d. 1095 (1st DCA 1976) and *Vasil vs. State*, 374 So.2d. 465 (Fla. 1979) ("Under a felony murder theory, proof of the underlying felony is proof of an essential element of the murder.") [Hatchett, J., dissenting at 473].

Obstensibly, it is the commission of the homicide in conjunction with the *intent* to commit a felony which supplants the ". . . premeditation or malice aforethought. . ."[2] classically required in a first degree murder prosecution, *See, Flemming vs. State*, 374, So.2d. 954, 956 (Fla. 1979); *Adams vs. State*, 341 So.2d. 765 (Fla. 1976), *cert. denied*, 434 U.S. 878, 98 S.Ct. 232,

[2]Deloach vs. State, 388 So.2d. 31 (3rd DCA 1980)

54L.Ed.2d. 158 (1977); and *Bryant vs. State*, 412 So.2d. 347 (Fla. 1980).

Although the State need not prove premeditation or a specific intent to kill under a felony murder theory, it must prove the accused *entertained the mental element required to convict on the underlying felony. See, Jacobs vs. State*, 396 So.2d. 1113 (Fla. 1981), *cert. denied*, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d. 239 (1981); and *Adams, supra*. The state must prove the accused *intended* to commit the felony. *Robles vs. State*, 188 So. 2d. 789 (Fla. 1966) and *Deloach vs. State*, 388 So.2d. 31 (3rd DCA 1980).

In this case though, the State has failed to prove the underlying felony as well as evidenced by the jury's verdict of guilty of of a lesser included offense,[3] (See, R-274; App. "E"). The judgement and sentence therefore, is fundamentally defective since proof of the underlying felony was required to establish the specific intent necessary to sustain the conviction on a felony murder theory. The error is fundamental because the jury's return of the lesser verdict establishes the absence of evidence sufficient to convict on the charged theory of intent. The error is also of constitutional proportions because of the legal inconsistency of the verdicts and considering that the evidence was legally insufficient as a matter of law to sustain conviction on the felony murder theory. *See, Gurganus vs. State*, 451 So.2d. 817

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[3]False Imprisonment is defined as a "general intent" crime as opposed to kidnapping which differ with regard to the specific intent required to commit the later crime. *See, State vs. Graham*, 468 So.2d. 270 (2nd DCA 1985); *Mills vs. State*, 407 So.2d. 218, at 221 n. 3 (3rd DCA 1981) and Annot. 68 A.L.R. 3rd. 828 (1976). *See also, Lineham vs. State*, 442 So.2d. 244 (2nd. DCA 1983) for discussion of general *vs.* specific intent.

(Fla. 1984); *MaHaun vs. State, supra;* and *Jackson vs. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d. 560 (1979).

This error goes to the heart of the conviction and a fair trial rendering same fundamentally defective because the State has failed to prove the requisite specific intent necessary to sustain the conviction under the felony murder theory or otherwise, thus denying Defendant due process and equal protection of law contrary to Article I, §9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The State may not disavow its burden to prove each and every element of the crime charged beyond a reasonable doubt. *See, In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d. 368 (1970); *Engle vs. Isacc,* ___U.S.___, 102 S.Ct. 1558 (1982) and *Martin vs. Blackburn,* 521 F.Supp. 685 (E.D. La. 1981).

The presumption of innocence, so basic to our concepts of justice, due process and a fair and impartial trial abides with the accused through every step of the criminal prosecution and can only be overcome by substantial probative evidence on each element of the offense charged which clearly establishes guilt beyond reasonable doubt. *See, e.g., Estelle vs. Williams,* ___U.S.___, 98 S.Ct. 1691 (1976); *Purifoy vs. State,* 359 So.2d. 446 (Fla. 1978) and *Bennet vs. State, supra.*

Since the State has failed to prove any theory upon which the intent necessary to sustain conviction of felony or premeditated murder can rest, the judgement and conviction must be vacated as a matter of law, *Jackson vs. Virginia, supra.* Furthermore, since there are no alternative theories charged in the information

upon which specific intent could be found and, considering that legally inconsistent jury verdicts preclude a finding of premeditation outright, the double jeopardy clause of the Florida[4] and United States[5] Constitutions prohibit retrial where the State has failed to prove requisite specific intent to commit murder. *Jackson vs. Virginia, supra; Green vs. Massey;* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d. 15 (1978) and *Burks vs. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d. 1 (1978).

15) The jury verdicts are legally inconsistent and cannot sustain conviction for the murder charged rendering the conviction constitutionally infirm. Denial of the Constitutional right not to be convicted except upon evidence that proves guilt beyond reasonable doubt is a fundamental injustice which is properly considered in a motion for post-conviction relief via Rule 3.850, *Fla.R.Cr.P.*.

16) There are no other petitions, applications or motions now pending in any court with regard to the judgement and sentence under attack.

17) N/A

18) Defendant was represented at trial by:

Craig Stella, Esquire
312 S.E. 17th Street
Ft. Lauderdale, Florida 33316

AND on appeal by:

T. Don Tenbrook, Esquire

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[4]Article I, §9 Florida Constitution

[5]Article 5 — United States Constitution

Suite 201 N., Justice Bldg.,
524 S. Andrews Ave.,
Ft. Lauderdale, Florida 33301

Defendant is proceeding Pro Se in these proceedings for collateral relief.

WHEREFORE, Defendant prays the Court to grant this Motion For Post-Conviction Relief and to vacate the judgement and sentence herein challenged, forever discharging Defendant from prosecution of the substantive charge and such further relief as should be deemed just and proper in this cause.

Respectfully Submitted,

/s/ Joel Estremera
Joel Estremera Pro Se # 097824

STATE OF FLORIDA :
:
COUNTY OF BAKER :

BEFORE me the undersigned authority, personally appeared this day, Joel Estremera, who first being duly sworn, says that he has read the foregoing motion for post-conviction relief and has personal knowledge of the facts and matters set forth therein and alleged; and that each and all of them are true and correct.

SWORN TO and SUBSCRIBED before me this 28 day of JULY, 1987.

My Commission Expires: [illegible]

/s/ [illegible]
NOTARY AT LARGE, FL.

CERTIFICATE OF SERVICE

I do HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney in care of Janet Reno, Esquire at Room 600, Metropolitan Justice Bldg., 1351 N.W. 12th Street, Miami, Florida 33125.

/s/ Joel Estremera

JOEL ESTREMERA
PRO SE # 097824
BAKER CORRECTIONAL
INSTITUTION
POST OFFICE BOX 500 / A-16
OLUSTEE, FLORIDA 32072

PETITION UNDER 28 USC § 2254
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

United States District Court

District SOUTHERN

Name JOEL ESTREMERA

Prisoner No. 097824

Docket No. 88-0296 CIV-ATKINS
MAGISTRATE SORRENTINO

Place of Confinement BAKER CORRECTIONAL INSTITUTION, P.O. Box 500 — Olustee, Florida 32072

Name of Petitioner JOEL ESTREMERA V.

Name of Respondent RICHARD L. DUGGER

The Attorney General of the State of: FLORIDA — ROBERT BUTTERWORTH

PETITION

1. Name and location which entered the judgment of conviction under attack Eleventh Judicial Circuit Court in and for Dade County, Florida.

2. Date of judgment of conviction April 24, 1985

3. Length of sentence (Count 1,3,9) Five years; (Count 4) Fifteen years; (Count 2) Three-hundred sixty-four (364) days; (Count 7) Life — 25 year minimum mandatory. (Concurrent)

4. Nature of offense involved Three Counts of Aggravated Assault; One Count of Improper Exhibition of a Weapon; One Count of False Imprisonment; and One Count First Degree Murder.

5. What was your plea? Not guilty

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. Kind of trial: Jury

7. Did you testify at the trial? No

8. Did you appeal from the judgment of conviction? Yes

9. If you did appeal, answer the following:

(a) Name of court THIRD DISTRICT COURT OF APPEAL

(b) Result AFFIRMED; Estremera vs. State, 498 So.2d. 572

(c) Date of result December 2, 1986

(d) Grounds raised (1) The Court erred in refusing to instruct the jury on third degree murder as a lesser included offense of first degree (felony) murder (2) There was insufficient evidence of premeditation to support a conviction of first degree murder (3) Imporper reasons for departure, and failure to prepare a proper written statement of reasons supporting departure.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court The Eleventh Judicial Circuit in and for Dade County, Florida

(2) Name of proceeding Motion for Post-Conviction Relief pursuant to Rule 3.850, Fla.R.Cr.P. (1987).

(3) Grounds raised The judgement and sentence is fundamentally defective where the State failed to prove the underlying felony in a felony murder prosecution and where legally inconsistent jury verdicts establish that premeditation was not proven beyond a reasonable doubt.

(4) Did you receive an evidentiary hearing on your petition, application or motion? No

(5) Result Motion Denied

(6) Date of result August 5, 1987

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion? First petition, etc. Yes

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all

grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You must raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: The judgement and sentence is fundamentally defective where failure to prove the underlying felony in a felony murder prosecution/and legally inconsistent verdicts establish that premeditation was not proven beyond reasonable doubt in violation of Petitioner's rights to due porcess and equal protection of law.

Supporting FACTS: Petitioner was charged with first degree murder pursuant to §782.04 *Fla.State.* (1985). The State also charged that Petitioner committed the murder during the commission of or attempted commission of a kidnapping (i.e. felony murder theory). However, the jury returned a guilty verdict on the charged lesser included offense of "False Imprisonment", which is not one of the enumerated felonies listed in §782.04(1) *Fla.Stat.* While the jury could have found Petitioner guilty of premeditated murder in the alternative, the jury verdicts are legally inconsistent and cannot support such a finding. By finding Petitioner guilty of the lesser offense of false imprisonment, the jury clearly rejected the theory that Petitioner intended to commit or facilitate commission of the murder or other felonies charged in the indictment as the underlying felonies attendant to the Kidnapping charge. The State had argued Petitioner had a "plan to kill" (murder) the victim but the jury found this plan (intent) insufficient to convict on the Kidnapping charge, and therefore insufficient to prove premeditation outright.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: The grounds listed in 12A, B, C,

and D are not applicable to the petitioner as the issues have been properly preserved from the direct appeal and collateral proceedings had in the State Courts.

14. Do you have any petition or appeal now pendiing in any court, either state or federal, as to the judgment under attack? No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(b) At arraignment and plea Craig Stella, Esquire; 312 S.E. 17th St., Ft. Lauderdale, Florida 33316.

(c) At trial Same as above.

(d) At sentencing Same as above.

(e) On appeal T. Don Tembrook, Esquire, Suite 201 H, Justice Bldg., 524 South Andrews Ave., Ft. Lauderdale, 33301.

(f) In any post-conviction proceeding Joel Estremera, Pro Se; Baker Correctional Institution Olustee, Florida 32072

(g) On appeal from any adverse ruling in a post-conviction proceeding Joel Estremera, Pro Se.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? No

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

/s/ Joel Estremera
Signature of Attorney

I declare under penalty of perjury that the foregoing is true and correct. Executed on 2-15-88 (date).

/s/ Joel Estremera
Signature of Petitioner

[FILED AUG. 20, 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0296-Civ-ATKINS
MAGISTRATE SORRENTINO

JOEL ESTREMERA,

Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

FINAL JUDGMENT

For the reasons stated in the Report of the United States Magistrate, and upon independent review of the file, it is

ORDERED AND ADJUDGED that this petition for writ of habeas corpus is denied.

DONE AND ORDERED at Miami, Florida this 29th day of August, 1988.

/s/ Clyde Atkins
UNITED STATES
DISTRICT JUDGE

cc: Joel Estremera
Fariba Komeila, Asst Atty General

Judge Sorrentino

[CLOSED CIVIL CASE SEP 1 1988]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5916
Non-Argument Calendar

D. C. Docket No. 88-296

JOEL ESTREMERA,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,
Secretary of Department of Corrections
and
ROBERT BUTTERWORTH,
Attorney General,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(July 31, 1989)

Before HILL, FAY and CLARK, Circuit Judges.

PER CURIAM:

The sole issue presented in this appeal from the denial of the petition for habeas corpus is whether the evidence at trial was sufficient to support the jury finding of premeditation. We find the evidence sufficient.

AFFIRMED.